

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT AND
CONDITIONAL USE PERMIT ISSUED
BY THE CITY OF TACOMA TO
HUGH BARDEN,

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant,

v.

CITY OF TACOMA and HUGH BARDEN,

Respondents.

HUGH BARDEN and CITY OF TACOMA,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

SHB No. 83-42 and 84-27

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

SHB No. 84-33

This matter, the request for review of a shoreline substantial

1 development and conditional use permit granted by the City of Tacoma
2 to Hugh Barden, came on for hearing before the Shorelines Hearings
3 Board; Lawrence J. Faulk, Gayle Rothrock, Wick Dufford, and Nancy R.
4 Burnett, convened at Lacey, Washington, on December 3 and 4, 1984.
5 Administrative Appeals Judge William A. Harrison presided.

6 Hugh Barden appeared by his attorney Ronald Thompson. State of
7 Washington, Department of Ecology appeared by Jay J. Manning,
8 Assistant Attorney General. The City of Tacoma did not appear.
9 Reporters Lisa Flechtner and Kim L. Otis recorded the proceedings.

10 Witnesses were sworn and testified. Exhibits were examined. From
11 the testimony heard and exhibits examined, the Shorelines Hearings
12 Board makes these

13 FINDINGS OF FACT

14 I

15 This matter arises on Commencement Bay in Tacoma. The site is
16 located on Ruston Way. Nearby uses are located over the water and
17 include the Tacoma Fire Boat dock, a fishing pier, and a restaurant.

18 II

19 On February 28, 1984, Mr. Hugh Barden applied to the City of
20 Tacoma for a shoreline substantial development and conditional use
21 permit. His proposed development consists of a twelve-slip sailboat
22 marina, a pier platform supporting caretaker's quarters and a boat
23 repair shed, a boat launching ramp and a protective floating
24 breakwater made from old tires. There would also be parking for seven
25 cars on the pier.

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1 III

2 The site is designated "S-6" by the Tacoma Shoreline Master
3 Program (TSMP). This is an "urban environment." TSMP Section
4 13.10.090(c), page 20.

5 IV

6 Marinas and boat launch facilities are permitted uses within the
7 subject S-6 shoreline designation. TSMP Section 13.10.090(D)(6), page
8 21.

9 V

10 The proposed caretaker's quarters would consist of a two-story
11 building of more than 2,000 square feet with waterward decks on each
12 floor. It would be positioned at the waterward edge of the pier to
13 afford a view of the marina. It would be the principal abode of Mr.
14 and Mrs. Barden, the permit applicants. There would be, however,
15 laundry and toilet facilities within the building for the use of
16 marina customers. Residences are not set forth as a permitted use in
17 the subject R-6 shoreline designation. TSMP Section 13.10.090(D),
18 page 20.

19 VI

20 The boat repair shed is proposed for boat repair only and not boat
21 building. From the proposed shed it would be possible to operate a
22 boat repair business which would be incidental to the marina or
23 conversely, to operate in such a way that the marina becomes
24 incidental to the boat repair. Tacoma asserts that if the boat repair
25 business becomes the principal use of the site, such would constitute

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1 an industrial use of the property (Exhibit A-3, page 4). Industrial
2 use is prohibited at the site in question. TSMP 13.10.090(D)(9), page
3 21.

4 VII

5 Piers are a permitted use in the subject S-6 shoreline
6 designation. TSMP Section 13.10.090(D)(8), page 21. However, piers
7 over the water used for the purpose of vehicle parking when associated
8 with a water-dependent or water-related use shall be a conditional
9 use. TSMP Section 13.10.175(11)(b)(3)(a), page 54. The Barden
10 family, including others than Mr. and Mrs. Barden, owns land across
11 Ruston Way (on the upland side) which is now leased for parking to an
12 unrelated business known as the Door Store. The lease is for a
13 five-year term and renewable at the option of the lessee. Mr. Barden
14 also leases land on the upland side of Ruston Way but prefers the
15 safety and continuity of parking on the proposed pier which he would
16 own. Parking on fill exists upon the Ruston Way shoreline, in the
17 vicinity of the site, for accommodating customers of restaurants and
18 other over the water development. The proposed parking would be on a
19 pile-supported pier and has provision to assure that oil leakage from
20 cars will not enter the water.

21 VIII

22 The proposed development would be partially upon state-owned beds
23 of Commencement Bay. According to the diagram given with the
24 application for the shoreline permits, the proposed marina floats
25 impinge upon the extended property line between the site and the

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1 adjacent property owned by Mrs. Dorothy Healy. Such an arrangement,
2 if followed by similarly impinging development on the Healy site,
3 would allow no clear channel for navigation between the developments.
4 Mr. Barden has expressed a willingness to shift the location of the
5 marina floats to allow such a channel for navigation. The State
6 Department of Natural Resources, as lessor of the state-owned beds of
7 Commencement Bay, has expressed the imperative of maintaining a
8 channel for navigation as just described.

9 IX

10 The proposed floating breakwater would be positioned in the path
11 of severe wave activity, especially in the winter months. The
12 breakwater and marina floats are proposed for year-around use although
13 the breakwater would be shifted closer to the marina floats in
14 winter. Although the breakwater is intended to dampen wave action, it
15 is possible that a storm of the frequency which occurs each five to
16 ten years at the site could overcome the breakwater and cause severe
17 damage to either the floats or the boats moored there. It is possible
18 to study the feasibility of the proposed breakwater. Such a study
19 would disclose whether the proposed breakwater can provide the
20 intended protection for the marina. Breakwaters require special
21 consideration in the subject S-6 shoreline designation. TSMP Section
22 13.10.090(E)(1), page 21.

23 X

24 On September 6, 1983, Tacoma approved a shoreline substantial
25 development and conditional use permit for the proposed development.

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1 The approval, however, was contingent on fulfillment of a condition
2 (No. 7.a.12 of the Hearing Examiner) relating to fire protection which
3 had not then been met. The State Department of Ecology appealed the
4 substantial development permit to this Board on October 7, 1983 (SHB
5 No. 83-42).

6 XI

7 Under date of May 29, 1984, the City of Tacoma approved, again, a
8 shoreline substantial development permit and conditional use permit
9 for the proposed development. Department of Ecology appealed the
10 substantial development permit to this Board on July 2, 1984 (SHB No.
11 84-27), and disapproved the conditional use under authority of RCW
12 90.58.140(12). Mr. Barden appealed that disapproval to this Board on
13 July 10, 1984 (SHB No. 84-33).

14 XII

15 The May 29, 1984, second permit approved by the City of Tacoma
16 contained the following special conditions:

17 1. All conditions set forth in the Examiner's Report
18 and Recommendation of July 26, 1983 (File No.
19 141.297).

20 2. The applicant shall submit a detailed landscaping
21 plan to the Land Use Administrator for review and
22 approval which shall be consistent with the
23 landscaping requirements set forth in Section F of
24 Exhibit No. 3 attached hereto and the Ruston Way Plan.

25 3. Cosmetic basaltic riprap material shall be
26 required for the visible portion of the applicant's
27 shoreline frontage. The applicant shall utilize
broken, irregular, sandstone, or other basaltic rock
in accordance with the Ruston Way Plan.

4. The exterior color scheme of the proposed boat
shed and caretaker's quarters shall be consistent

1 with the intent of the Ruston Way Plan. The roof
2 surfaces shall be pitched and of wood composition in
3 accordance with the Ruston Way Plan. The Ruston Way
4 Plan recommends subdued tones of blues, browns,
grays, and greens. Bright colors may be used for
accent. The color scheme is to be submitted for
review and approval of the Land Use Administrator.

5 5. The applicant shall submit an independent
6 engineering report from a local licensed professional
7 engineer experienced in breakwater design and
8 configuration, on the feasibility and capacity of the
9 proposed floating tire breakwater. This report shall
10 be reviewed and approved by the Land Use
Administrator prior to issuance of any building
permits. The Land Use Administrator shall be allowed
appropriate time in which to properly consult with
individuals and agencies with recognized expertise in
this regard in order to ensure the report's
completeness and validity.

11 6. The applicant shall develop the property and the
12 allowed uses totally and concurrently as a unit, and
13 the project shall thereafter remain operable as a
14 marina facility. Any development of the property and
allowed uses separately will be grounds for
revocation of this permit.

15 7. The applicant, in developing the property, shall
16 make adequate provision for members of the public for
17 sitting and viewing the activity of the marina, such
areas shall be depicted in the landscaping plan
required by Condition A.2 above.

18 8. A street occupancy permit, authorizing the
19 improvements shown on the permit plans within the
20 right-of-way of Alder Streets, shall be obtained by
the applicant prior to the commencement of the
project, including the issuance of any building or
other development permits.

21 9. Electrical service to this site will be provided
22 from an existing underground electrical distribution
23 system along the northerly side of Ruston Way. The
24 applicant should contact the Consumer Service and
25 Conservation Office upon approval of a site plan to
26 obtain information about Light Division requirements
and charges for electrical service.

27 10. The layout of the parking lot shall be subject
to approval of the Traffic Engineer.

1 The conditions incorporated by the first condition, above, are:

2 1. The applicant shall submit a detailed landscaping
3 plan to the Land Use Administrator for review and
4 approval which shall be consistent with the
5 landscaping requirements set forth in Section F of
6 the Planning Department Report and the Ruston Way
7 Plan.

8 2. Cosmetic basaltic riprap material shall be
9 required for the visible portion of the applicant's
10 shoreline frontage. The applicant shall utilize
11 broken, irregular, sandstone, or other basaltic rock
12 in accordance with the Ruston Way Plan.

13 3. The exterior color scheme of the proposed boat
14 shed and caretaker's quarters shall be consistent
15 with the intent of the Ruston Way Plan. The roof
16 surfaces shall be pitched and of wood composition in
17 accordance with the Ruston Way Plan. The Ruston Way
18 Plan recommends subdued tones of blues, browns,
19 grays, and greens. Bright colors may be used for
20 accent. The color scheme is to be submitted for
21 review and approval of the Land Use Administrator.

22 4. The applicant shall demonstrate, to the
23 satisfaction of the City Engineer, the soundness of
24 the floating tire breakwater from an engineering
25 standpoint, and the City Engineer may require the
26 applicant to provide an engineering analysis of the
27 breakwater prepared by the independent licensed
engineer. The analysis shall be reviewed and
approved by the City Engineer prior to the issuance
of any building permits for the project. The
necessity for the foregoing is set forth in Finding
No. 8 and Conclusion No. 4 herein.

5. The applicant shall develop the property and the
allowed uses totally and concurrently as a unit, and
the project shall thereafter remain operable as a
marina facility. Any development of the property and
allowed uses separately will be grounds for
revocation of this permit provided, however, that the
caretaker's quarters will require the approval of the
Land Use Administrator consistent with Finding No. 9
hereof and will not be constructed or occupied until
the balance of the project has been completed and
will be vacated and not used for residential purposes
of any kind in the event that the marina/boat
launching uses are abandoned.

1 6. Re: Boat repair shed: To the extent that such
2 activities are related to and incidental to the
3 principal uses, i.e., marina and boat launching, such
4 activities should be permitted provided, however,
5 that the use is restricted as discussed above and
6 provided that ship building activities or other
7 industrial uses are not conducted at the site. The
8 Land Use Administrator shall carefully monitor boat
9 repair shed activities to insure compliance with the
10 foregoing.

11 7. The applicant, in developing the property, shall
12 make adequate provision for members of the public for
13 sitting and viewing the activity of the marina, and
14 such areas shall be depicted in the landscaping plan
15 required by Condition A(1) above.

16 8. A street occupancy permit, authorizing the
17 improvements shown on the permit plans within the
18 right-of-way of Alder Street, shall be obtained by
19 the applicant prior to the commencement of the
20 project, including the issuance of any building or
21 other development permits.

22 9. The developer shall construct concrete curb and
23 gutter and a 10-foot asphalt bike path on the
24 northerly side of Ruston Way from the easterly line
25 of the site to connect to the existing curb and
26 gutter and bike path, which is approximately the
27 centerline of Alder Street. The curb and gutter and
bike path shall be constructed at a location to be
approved by the City Engineer. Any necessary
patching to the present roadway shall be constructed
to City of Tacoma arterial standards.

10. The layout of the parking lot shall be subject
to the approval of the Traffic Engineer.

11. Requirements of the Washington State Departments
of Ecology and Natural Resources shall be complied
with, as the same have been set forth as attachments
to the Planning Department Report (Exhibit No. 2
herein).

12. The applicant will file with the Examiner within
fourteen (14) days from the date of this report a
report from the Tacoma Fire Department outlining (sic)
its requirements related to the pier and its size.
Unavailability of other options to the Department
should be discussed as well. In the event the report

1 is not provided or is not corroborative of the
2 applicant's position, then, in that event, the
3 Examiner will recommend that the Council remand the
4 matter for further hearing on the issue.

5 XIII

6 Any Conclusion of Law which is deemed a Finding of Fact is hereby
7 adopted as such.

8 From these Findings of Fact the Board comes to these

9 CONCLUSIONS OF LAW

10 I

11 We review the proposed development for consistency with the
12 applicable (Tacoma) shoreline master program (TSMP) and the Shoreline
13 Management Act (SMA). RCW 90.58.140.

14 II

15 At the outset we conclude that Tacoma should endeavor not to
16 approve any shoreline permit like that of September 6, 1983, (the
17 first permit herein) which contains unfulfilled contingencies. This
18 has necessitated the approval of a second permit, that of May 29,
19 1984, with the proposal made subject to overlapping conditions drawn
20 from both permits. While this has not been prejudicial to the parties
21 in this instance, it could prove so in a future case.

22 III

23 We conclude that the permit of September 6, 1983, was not final.
24 We would have remanded such a permit had our hearing in this matter
25 been convened prior to approval of the second permit by Tacoma on
26 May 29, 1984. SAVE v. City of Bothell and the Koll Company, SHB Nos.
27 81-27, 81-28, and 81-32 (Order Granting Summary Judgment, 1982).

IV

The approval of the second permit by Tacoma on May 29, 1984, occurred during the pendency of review by this Board. Action by a local government on a matter pending before this Board could result in prejudice to both the parties conducting the appeal and the public at large. See Bullitt v. Seattle SHB Nos. 81-29 and 82-44 (1983). While that does not appear to be the case in this instance, the better and correct way to proceed would have been for the local government to enter its appearance in the appeal before us and move for remand.

V

The permit of September 6, 1983, was never made final and should be reversed in light of the permit dated May 29, 1984. The May, 1984, permit (together with those portions of the September, 1983, permit incorporated by reference within it) is now before us for review. We will hereafter refer only to it in these Conclusions of Law.

VI

The caretaker's quarters, as conditioned in the shoreline permit granted by Tacoma, are incidental to the proposed marina, are not a regular residence and are consistent with the TSMP.

VII

The boat repair shed, as conditioned in the shoreline permit granted by Tacoma, is incidental to the proposed marina, is not a prohibited industrial use and is consistent with the TSMP.

VIII

The proposed pier and parking for seven vehicles upon it is

1 consistent with the criteria for conditional uses, TSMP Section
2 13.10.180(B)(1) and (4), page 62.¹ It is consistent with the
3 general intent of RCW 90.58.020, would not interfere with the normal
4 public use of public shorelines, would be compatible with other uses
5 within the area and cause no adverse effect to the environment nor
6 detriment to the public interest. The same is true with regard to any
7 cumulative effect of similar proposals. The disapproval of
8 conditional use by Department of Ecology should be reversed.

9
10 1. The pertinent portions of TSMP Section 13.10.180(B)(1) and (4),
11 which are substantially the same as DOE WAC 173-14-140(1) and (4)
are:

12 B. SUBSTANTIAL DEVELOPMENT/CONDITIONAL USE PERMIT. Those
13 uses which are not categorized as permitted uses or as permitted
14 uses requiring special consideration for a specific Shoreline
15 district shall be required to be processed as a Conditional Use as
16 specified in WAC 173-14-130, requiring State Department of Ecology
17 approval. The purpose of a Conditional Use Permit is to allow
18 greater flexibility in varying the application of the use
regulations contained herein in a manner consistent with the
policies of RCW 90.58.020; provided that Conditional Use Permits
should also be granted in a circumstance where denial of the
permit would result in a thwarting of the policy enumerated in RCW
90.58.020.

19 1. Uses which are classified or set forth in this chapter as
20 conditional uses may be recommended for approval by the
Hearings Examiner and City Council only provided the applicant
can demonstrate all of the following:

21 a. That the proposed use will be consistent with the policies
22 and general intent of RCW 90.58.020 and the policies of the
regulations contained herein.

23 b. That the proposed use will not interfere with the normal
24 public use of the public shorelines.

25 c. That the proposed use of the site and design of the
26 project will be compatible with other permitted uses within
the area.

IX

The proposed development as set forth in the application and as approved is inconsistent with RCW 90.58.020 in that the positioning of the proposed marina floats do not reserve a navigation channel between it and future adjacent development. A shoreline permit which does not state otherwise is limited to the construction as represented in the application. Tarabochia, et al. v. Town of Gig Harbor, et al., SHB No. 77-7 (1977). SAVE v. City of Bothell and the Koll Company, SHB Nos. 82-29, et al. (1983). See also Hayes v. Yount, 87 W 2d 280, 552 P.2d 1038 (1976). Any further proposal regarding positioning of the marina floats should entail a new site diagram.

d. That the proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is to be located.

e. That the public interest suffers no substantial detrimental effect.

2. Other uses which are not classified or set forth in the regulations contained herein may be authorized as conditional uses provided the applicant can demonstrate, in addition to the criteria set forth in WAC 173-14-140(1) and enumerated in Section 13.10.180.B.1 above, that extraordinary circumstances preclude reasonable use of the property in a manner consistent with these use regulations.

. . .

4. In the granting of all Conditional Use Permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if Conditional Use Permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses should also remain consistent with the policies of RCW 90.58.020 and should not produce substantial adverse effects to the shoreline environment.

The proposed breakwater as approved by the shoreline permit before us is inconsistent with the requirements for special consideration of the TSMP. In particular, the uncertainty of the protection that the proposed breakwater can afford renders approval of a shoreline permit premature and inconsistent with TSMP Section 13.10.180(A)(b), page 61, which seeks to avoid activities which may be injurious to shorelines or to adjacent property, such as the boats to be moored at the marina. The breakwater study required by conditions of the permit may rectify this inconsistency. However, the soundness of the proposed breakwater should have been demonstrated to the City Engineer and the City Land Use Administrator via that study prior to approval of the shoreline permit.

To delay both final design of the breakwater and the decision as to the appropriateness of that design until after the permit is issued, is to confer upon the Tacoma Land Use Administrator a critical decision-making role which is unreviewable through the SMA scheme. Both the public and interested government agencies are effectively eliminated from the process on a critical issue. Ultimately, the effect in this case is to usurp the function of this Board.

XI

In summary, the proposed development, as conditioned by the shoreline permit approved by Tacoma, has not been shown to be inconsistent with the TSMP or SMA with regard to the caretaker's quarters (Conclusion of Law VI), boat repair shed (Conclusion of Law

1 VII), and pier with parking (Conclusion of Law VIII). However, it has
2 been shown to be inconsistent with the SMA regarding positioning of
3 the floats relative to a navigation channel (Conclusion of Law IX) and
4 inconsistent with the TSMP regarding approval of a shoreline permit
5 before the breakwater is studied and its feasibility demonstrated to
6 the City Engineer and the City Land Use Administrator (Conclusion of
7 Law X).

8 The permit should be reversed and remanded. Any further approval
9 of a shoreline permit for this proposed development should be
10 consistent with the foregoing determinations.

11 XII

12 Any Finding of Fact which is deemed a Conclusion of Law is hereby
13 adopted as such.

14 From these Conclusions of Law the Board enters this
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ORDER

The shoreline substantial development and conditional use permit of September, 1983, granted by the City of Tacoma to Hugh Barden is reversed.


The shoreline substantial development and conditional use permit of May, 1984, granted by the City of Tacoma to Hugh Barden is reversed and remanded to Tacoma for further action consistent with this decision.


The disapproval of conditional use by Department of Ecology is reversed and the conditional use issues remanded to Tacoma for further action consistent with this decision.

DONE at Lacey, Washington, this 10th day of April, 1985.


SHORELINES HEARINGS BOARD

 4/19/85
LAWRENCE J. FAULK, Chairman


GAYLE ROTHROCK, Vice Chairman


WICK DUFFORD, Lawyer Member


NANCY R. BURNETT, Member


WILLIAM A. HARRISON
Administrative Appeals Judge